

Fair Political Practices Commission

Memorandum

To: Chairman Getman, Commissioners Deaver, Makel, Scott and Swanson

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Subject: Pre-Notice Discussion
Manner of Disqualification (Conflicts Project, Phase 2, Project M)
Legally Required Participation (Conflicts Project, Phase 2, Project Q)

Date: September 26, 2000

I. Background

Project M: In Phase 1 of the Conflict of Interest Improvement Project, the Commission devised an eight-step approach that public officials use to decide whether they have a conflict of interest in a particular decision. However, the regulations do not provide clear guidance regarding the official's obligations after he or she determines that a conflict exists.

Project Q: If a public official has a disqualifying conflict of interest in a governmental decision, he or she may still be able to act if his or her participation is "legally required." This narrowly construed exception may only be invoked in particular circumstances. An official who acts pursuant to the exception must follow certain procedures and make certain disclosures. Regulation 18708 construing the phrase "legally required" may be clarified to give more guidance as to the particular information that must be disclosed, and the required timing and means of disclosure.

II. Project M

A. Overview

The purpose of Project M is to clarify the current regulations regarding a public official's responsibilities once he or she is disqualified from making, participating in making or influencing a decision. These requirements are found in two regulations. Regulation 18702.1(a)(5) sets forth an official's obligations once he or she is disqualified from *making* a governmental decision. Regulation 18730(b)(10) gives similar guidance in the context of designated employees.

In addition to the requirements found in Regulations 18702.1(a)(5) and 18730(b)(10), a California Court of Appeal opinion, *Hamilton v. Los Gatos* (1989) 213 Cal.App.3d 1050, contains additional requirements. Lastly, staff has given guidance to officials who have requested more details regarding what they can and cannot do when they have a conflict. The Commission may consider whether the staff's advice should be added to the regulations.

B. Determining whether the disclosure requirements of 18702.1 and 18730(b)(10) should be deleted, made permissive, or remain mandatory.

Staff held interested persons meetings to discuss Project M on March 9, 2000 and August 24, 2000. At both meetings, participants forcefully argued that the Commission should not require disclosures to be made when an official decides not to participate because he or she has a conflict of interest. The argument goes like this: The Act requires officials to make disclosures on their statements of economic interest, and requires that they abstain from making a governmental decision when it is reasonably foreseeable that the decision will have an impact on their economic interests. When an official abstains from making a decision, he or she has complied with the Act. An additional disclosure requirement, they argue, serves no purpose.

The regulation file is silent on the original purposes for requiring an official to make disclosures when he or she abstains from acting. A major purpose of the Political Reform Act is that "[a]ssets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided." (Government Code § 81002(c).)¹ Further, the Act should be "liberally construed to accomplish its purposes." (Section 81003.) The FPPC has the authority to adopt, amend, and rescind rules and regulations to carry out the purposes and provisions of the Act. (Section 83112.) When construed liberally, the disclosure requirement arguably meets the purposes of the Act because the disclosure results in the public having more information about what economic interests are triggering a conflict.

This project allows the Commission to reflect on whether it *should* continue with a mandatory rule. Those supporting these disclosure requirements argue that the public has the right to know the precise economic interest that creates the conflict at the time the official decides to abstain. Supporters also argue that if an official abstains, he or she needs to prove that an economic interest is, in fact, causing the abstention. Otherwise, the public does not know if the official really has an economic interest, or is just trying to "get out" of performing his or her official duty.

On the other hand, the economic interests that the official will disclose should already be, or will be, disclosed in the official's Statement of Economic Interests. Requiring the official to again state the interest at the time they abstain from making a decision is duplicative. While there are certain economic interests that can create a

¹ All further statutory references are to the Government Code, unless otherwise indicated.

conflict that *are not* disclosed on a Statement of Economic Interest, such as the official's personal residence, the reasons for exempting these interests from disclosure on the SEI (i.e. right to privacy) should also apply in the context of an open meeting. Also, it is difficult to see why a contemporaneous disclosure is important given that the public official is complying with the Act by abstaining from making the decision. And the argument that the official might abstain when he or she *doesn't really* have a conflict is unpersuasive. Ensuring that public officials participate in making governmental decisions is not one of the purposes of the Political Reform Act. (See §81002.)

In addition, interested persons have raised some practical reasons why the mandatory rule is difficult. Assume a city councilmember is sick the day of a council meeting, and the council discusses and makes a decision regarding an item in which the sick official has a conflict. Is that official required to rush down to the meeting to make the proper oral disclosure? What if the issue is the only item on the agenda, and the councilmember wishes to stay home from the meeting since he or she cannot participate. Must this official attend anyway in order to make the disclosure?

However, there is another alternative that falls short of abolishing the requirement. Several interested persons recommended that the disclosures be permissive. Many public officials prefer to disclose their interests when abstaining from a decision. This is particularly true in an open meeting of the agency when the official's determination not to participate can have political consequences. And designated employees sometimes like the security of providing a written explanation detailing the reasons they are abstaining from a particular assignment. By making the requirement permissive, we, in a sense, encourage the official to make these disclosures, without requiring it in every instance.

Decision #1 – Should the disclosure requirements of Regulations 18702.1 and 18730(b)(10) be deleted, made permissive or continue to be mandatory?

Staff recommends that the Commission adopt a permissive rule that allows an official to make disclosures when he or she abstains from acting. The draft language can be found in Option B, Exhibits A and B. If the Commission decides that the requirements should be deleted, it should adopt Option A, Exhibits A and B. If the Commission decides that the rules should remain mandatory, it must also decide what disclosures should be made, and how they should be made. Commission staff recommends Option C in Exhibits A and B. Those recommendations are discussed in detail below at Section III.B., at page 6, regarding the disclosures that are required when an official is legally required to make or participate in making a governmental decision.

C. Other rules governing the conduct of an official at an open or closed session of the agency when the official abstains due to a conflict of interest.

After the public official decides that he or she cannot participate due to a conflict of interest, questions arise regarding what the official can and cannot do at an open or closed session of the agency. The most frequently asked questions are:

1. May an official attend a closed session of the agency where the agency is discussing an item that creates a conflict of interest for the official?

The court addressed this question in *Hamilton v. Los Gatos, supra*, 213 Cal.App.3d 1050. In that case a city councilmember, Robert Hamilton, voluntarily absented himself during a closed session of the council due to a financial conflict of interest in the subject being discussed during closed session. Subsequently, Hamilton requested a tape recording of the closed session. When the city clerk denied his request, Hamilton filed a petition for writ of mandate to require the town to make the tape available to him. The superior court denied the petition.

Hamilton argued that section 87100 of the Act prevented him only from actively participating in governmental decisions in which he had a conflict. He argued that his silent observations during closed session, or later acquisition of the tape, did not violate the Act. The Court of Appeal rejected these arguments, observing that the councilmember's mere access to the confidential information gives the "appearance of impropriety." (*Id.* at p. 1058.) Furthermore, the court stated that the official's mere presence could "subtly influence the decisions of other council members who must retain an ongoing relationship with him." (*Ibid.*) The court then held that Hamilton was properly denied access to the tape. The Commission has interpreted *Los Gatos* to prevent officials with a conflict from gaining information that is not otherwise available to the public. Consistent with this, the Commission has advised that disqualified officials may not attend closed sessions when the governmental decision that creates the conflict is discussed. And, consistent with *Los Gatos*, the Commission has stated that an official is prohibited from obtaining closed session materials regarding a matter in which the official has a conflict. (*Brauer Advice Letter, No. I-95-229.*)

2. During an open session, may a member of an agency remain on the dais or in his or her designated seat during deliberations and voting on the governmental decision in which the official has a conflict?

3. May the disqualified official be counted for purposes of achieving a quorum?

In dicta, the *Los Gatos* court discussed the Commission's *Hudson* Opinion. (*In re: Hudson* (1978) 4 FPPC Ops. 13.) The court opined that the *Hudson* Opinion "suggests that a disqualified official should not even be present at a hearing in which the official has a conflict." (*Id.* at p. 1057, emphasis added.) In the *Hudson* Opinion, a board of review consisted of five members. Three members constituted a quorum. A decision of the board required a majority of the quorum. Three of the five board members had a conflict of interest, and were thus disqualified from participating. In deciding the application of the "legally required participation" rule, the Commission determined that only one of the disqualified members should be permitted to participate, and two remaining board members were precluded from participating. While the *Hudson* Opinion did not use the word "presence" in discussing the disqualified member's participation, the

Los Gatos court inferred that the limitation was, in reality, a limitation on the non-participating board members' presence. The court reasoned that if the other two had been present, the full quorum of five would have been achieved. This conclusion by the court misreads *Hudson*, and has not been followed by the Commission. The Commission has consistently said that a disqualified official's presence at an open meeting is not precluded. (*Winters* Advice Letter, No. A-94-374.) However, an official's presence at an open meeting cannot be counted for purposes of achieving a quorum. (*Hudson* Opinion, 4 FPPC Ops. 13.)

4. During an open session, in what circumstances may an official address the public body when he or she has a conflict of interest?

Regulation 18702.4 provides that an official is not "influencing" a governmental decision if he or she "appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests." (Regulation 18702.4(b)(1).) That regulation goes on to define "personal interests." Because the staff receives this question so often when a disqualified official is trying to determine what he or she can and cannot do at an open meeting, staff believes that it would be helpful to cross-reference Regulation 18702.4 in Regulation 18702.1.

Decision #2: Should the Commission codify the answers to questions #1-4 in Regulation 18702.1 to answer these frequently asked questions regarding a disqualified official's conduct in open and closed meetings?

If the answer is yes, staff recommends the language found in draft 18702.1(b), attached as Exhibit A.

III. Project Q

A. Overview

The purpose of Project Q is to respond to the Los Angeles City Attorney's Office's suggestion that the Commission clarify and modify Regulation 18708. That regulation contains disclosure requirements when an official is "legally required" to participate in the making of a decision, but is not as clear as it should be regarding what disclosures must be made, and how they should be made.

The Commission may also want to consider whether Regulation 18708 should be amended to specify what disclosure requirements and procedures apply when an official is legally required to make or participate in a governmental decision by taking action outside an open or closed session of the agency.